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No. 88-1958

In The

Supreme Court of the United States

October Term, 1988

SUPREME BEEF PROCESSORS, INC.,

Petitioner.

v.

ROBERT YAQUINTO, JR.,
TRUSTEE FOR CARAVAN REFRIGERATED CARGO, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONER'S REPLY BRIEF

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TABLE OF CONTENTS

PAGE NO[S].

TABLE OF AUTHORITIES i

ARGUMENT:

I. ADDITIONAL CONFLICT BETWEEN CIRCUITS 1

II. REPLY TO BRIEF OF RESPONDENT 3

CONCLUSION 7

TABLE OF AUTHORITIES

COURT CASES:

General American Tank Car Corp. v. *Eldorado Terminal Co.*, 308 U.S. 422 (1939) 6

Great Northern R. Co. v. *Merchants Elevator Co.*, 259 U.S. 285 (1922) 6

Keller Industries, Inc. v. *U.S.*, 449 F.2d 163 (9th Cir. 1971) 6

Keogh v. *Chicago & N.W. Ry. Co.*, 260 U.S. 156 (1922) 3

Louisville & N. R.R. Co. v. *Maxwell*, 237 U.S. 94 (1915) 3

Maislin Industries, U.S., Inc. v. *Primary Steel, Inc.*, 705 F. Supp. 1401 (W.D. Mo. 1988) 2

Maislin Industries, U.S., Inc. v. *Primary Steel, Inc.*, ___ F.2d ___ (8th Cir. 1989) (Slip opinion, July 17, 1989) 1

Regular Common Carrier Conference, et al. v. *United States*, 793 F.2d 376 (D.C. Cir. 1986) .. 5

Seaboard System R.R. v. *United States*, 794 F.2d 635 (11th Cir. 1986) 4

PAGE NO[S].

Southwestern Sugar & Molasses Co. v. *River Terminals Corp.*, 360 U.S. 411 (1959) 6

Square D Co. v. *Niagara Frontier Tariff Bureau*, 476 U.S. 409 (1986) 4, 5

Texas and P. Ry. Co. v. *Abilene Cotton Oil Co.*, 204 U.S. 426 (1907) 6

United States v. *Western Pacific Railroad*, 352 U.S. 59 (1956) 6

INTERSTATE COMMERCE COMMISSION DECISION:

Ex Parte No. MC-177, National Industrial Transportation League — Petition to Initiate Rulemaking On Negotiated Motor Common Carrier Rates, 5 ICC 2d. 623 (1989) 7

STATUTORY PROVISIONS:

49 U.S.C. § 10701 ..... 2, 3, 4, 7

49 U.S.C. § 10761 ..... 2, 7

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ARGUMENT

I.

ADDITIONAL CONFLICT BETWEEN CIRCUITS

The conflict between the Fifth Circuit opinion below and the law of other circuits has been heightened by issuance of the decision of the Eighth Circuit Court of Appeals in *Maislin Industries, U.S., Inc.* v. *Primary Steel, Inc.*, __ F.2d __ (8th Cir. 1989) (Slip opinion, July 17, 1989) The factual and legal issues faced by the shipper in *Maislin* are virtually identical to those encountered by Petitioner. In both cases, the shipper had negotiated with a motor common carrier for the application of particular rates. In both cases, the carrier billed and collected based on the negotiated rates but failed to file the rates with the ICC. In both cases, the

carrier's bankruptcy trustee or collection agent later brought an action to collect freight charges based on higher published rates which had remained in effect as a result of the carrier's failure to file the negotiated rates. In both cases, the carrier opposed referral to the ICC on the ground that the ICC lacked power to hold that the carrier's conduct could constitute an unreasonable practice contrary to 49 U.S.C. § 10701 so as to bar collection of the higher rates. The District Court in *Maislin*, however, rejected this position and referred the case to the ICC, which agreed with the shipper's unreasonable practice contention. The District Court then ordered the carrier's complaint dismissed based on the ICC's finding. *Maislin Industries, U.S., Inc.* v. *Primary Steel, Inc.*, 705 F. Supp. 1401 (W.D. Mo. 1988).

The Eighth Circuit opinion affirms the District Court both in its referral of unreasonableness issues to the ICC and in its application of ICC findings to bar the carrier's action for collection. The court held that "the reasonableness of [the carrier's] billing practices is a matter properly within the ICC's primary jurisdiction." *Id.* at __ (Slip opinion at 5). It also rejected the contention that the reasonableness requirements of 49 U.S.C. § 10701 must be ignored because of the rate filing requirements of 49 U.S.C. § 10761. *Id.* at __ (Slip opinion at 9). The court further determined that the exercise of powers described by the ICC in *Negotiated Rates* was justified by statute in light of regulatory changes following the Motor Carrier Act of 1980. *Id.* at __ (Slip opinion at 11-12). The Eighth Circuit opinion thus is in direct conflict with the Fifth Circuit opinion in the instant proceeding, within the meaning of Supreme Court Rule 17.1(a).

II.

REPLY TO BRIEF OF RESPONDENT

Respondent's brief echoes the Fifth Circuit opinion below in ignoring the statutory right of shippers under 49 U.S.C. § 10701 to seek relief before the Interstate Commerce Commission from unreasonable motor carrier practices. Despite decades of court and ICC precedent confirming the ICC's power to declare published rates or their application to be unreasonable, Respondent continues to maintain that the only principle to be considered by this Court is the requirement that carriers initially assess charges in accordance with their published tariffs. Respondent ignores the parallel principle that such tariffs may not be applied where found by the ICC to be unreasonable. *Louisville & N. R. R. Co.* v. *Maxwell*, 237 U.S. 94, 97 (1915); *Keogh* v. *Chicago & N.W. Ry. Co.*, 260 U.S. 156, 163 (1922). In effect, Respondent's brief asks this Court to simply read out of existence the requirement of 49 U.S.C. § 10701 that motor common carrier rates and practices must be reasonable. Nothing in Respondent's brief supports the decision of the Fifth Circuit to interfere with the exclusive jurisdiction of the ICC by barring Petitioner from obtaining an ICC ruling on its unreasonable practice defense.

Respondent's brief mentions the ICC's statutory reasonableness powers only twice. At page 16, Respondent asserts that "*no act or omission of the carrier* (even 'unreasonable practices') can estop [a carrier] from collecting its full tariff charges" (emphasis in original). None of the three cases cited in support of that proposition, however, makes any mention of the unreasonable practices defense placed in quotation marks by Respondent. These cases involved situations in which

the shippers chose simply to assert common law defenses in court. None of these cases involved a claim that the published rate sought to be collected was unreasonable or that assessment of the published rate would be an unreasonable practice, so as to require consideration of unreasonableness issues by the ICC.[1] Like the Eleventh Circuit, Petitioner believes that prior to the inception of the present controversy, no reported case *ever* had held that a shipper is required to pay a published rate in the face of an ICC finding that assessment of that rate would constitute an unreasonable practice under 49 U.S.C. § 10701. *Seaboard System R. R. v. United States*, 794 F.2d 635, 638 (11th Cir. 1986). All authority is to the contrary.

Respondent's other reference to the ICC's reasonableness powers is found in its characterization of 49 U.S.C. § 10701 as "nothing but a general statement of legislative purpose" (Respondent's brief, page 9). Such a characterization of a provision which has formed a cornerstone of transportation law since its original enactment in 1887 demonstrates either a serious propensity to misstate the law or a fundamental lack of understanding of the relevant statutes. The statutory requirement that motor carrier rates and practices *must* be reasonable bears no similarity to the statements of "general legislative purpose" referred to in the quotation on page 8 of Respondent's brief from this Court's opinion in *Square D Co. v. Niagara Frontier Tariff Bureau*, 476 U.S. 409, 420 (1986). As the quotation itself indicates, the "general legislative purpose" referred to in *Square D* consisted of comments from the legislative history rather than statutory provisions. *Id.* at 419,

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[1] The Court of Appeals cases cited at page 10 of Respondent's brief similarly do not involve claims that the published rates sought to be collected were unreasonable or that collection of the published rates would constitute an unreasonable practice.

n. 25. This Court in *Square D* made three specific citations to the statutory power of the ICC to relieve shippers from unreasonableness of published rates or practices. *Id.* at 416, 418 n. 22, 416 n. 18. At no point did it refer to this power as a mere expression of general legislative purpose. Rather, the Court relied upon the existence of this power in the ICC to conclude that Congress did not intend to create remedies for parallel relief under the antitrust laws. *Id.* at 416, n. 18.

Respondent has totally misread the opinion of the D.C. Circuit in *Regular Common Carrier Conference, et al.* v. *United States*, 793 F.2d 376 (D.C. Cir. 1986), in citing that case for the proposition that a filed rate must be paid even in the face of an ICC finding of unreasonableness under 49 U.S.C. § 10701. The very language which Respondent quotes from that decision at page 13 of its brief negates such a contention. Judge (now Justice) Scalia noted in that opinion that one of the purposes served by statutory rate filing requirements was to allow the public "to enforce the requirement that rates be reasonable" [2] and "assert its right to challenge the lawfulness of existing or proposed rates". These are the very rights which Respondent mistakenly contends are barred by the filed rate doctrine. *Regular Common Carrier Conference* holds only that the ICC may not excuse common carriers from their statutory duty to file specific rates. It does not prohibit the ICC from using its reasonableness powers under 49 U.S.C. § 10701 to hold that such filed rates or their assessment would be unreasonable.

Respondent totally misconceives the primary and exclusive role which Congress and this Court have

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[2] Judge Scalia specifically cited 49 U.S.C. § 10701 following this reference to reasonableness. Respondent's brief omits this citation in its quotation from the Judge's opinion.

assigned to the ICC in determining rate reasonableness issues. ICC jurisdiction over the reasonableness of a rate or practice is exclusive. *United States* v. *Western Pacific Railroad*, 352 U.S. 59, 68 (1956)[3]; *Texas and P. Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426, 448 (1907). As this Court has noted,

> Whenever a rate, rule or practice is attacked as unreasonable * * * there must be preliminary resort to the [ICC]. *Great Northern R. Co.* v. *Merchants Elevator Co.*, 259 U.S. 285 at 291 (1922).

The Fifth Circuit opinion ignores this settled rule of allocation of law-making power between courts and administrative agencies. *United States* v. *Western Pacific Railroad, supra*, 352 U.S. at 65. In effect, the implication in the Fifth Circuit's opinion that the carrier practices complained of could never be statutorily unreasonable usurps the statutory power of the ICC to make such a finding. The proper course would have been for the courts below to stay their proceedings pending referral of reasonableness issues to the ICC, subject to eventual court consideration under established standards of judicial review. *Southwestern Sugar & Molasses Co.* v. *River Terminals Corp.*, 360 U.S. 411, 421 (1959); *General American Tank Car Corp.* v. *Eldorado Terminal Co.*, 308 U.S. 422, 433 (1939); *Keller Industries, Inc.* v. *U.S.*, 449 F.2d 163, 174 at n. 31 (9th Cir. 1971).

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[3] Respondent's reading of *Western Pacific* as holding that referral to the ICC is required only where a shipper seeks interpretation of a technical tariff issue ignores the fact that the *Western Pacific* court specifically stated that all cases in which shippers challenge the reasonableness of rates are required to be referred to the ICC. *Id.* at 68. The technical issues criterion in *Western Pacific* referred to by Respondent applies only where a shipper seeks ICC assistance in the interpretation of a tariff as opposed to its reasonableness.

A complete exposition of the ICC's basis for exercising its statutory jurisdiction over motor common carrier unreasonable practices is contained in its reopened decision in *Ex Parte No. MC-177, National Industrial Transportation League — Petition to Initiate Rulemaking On Negotiated Motor Common Carrier Rates*, 5 ICC 2d. 623 (served June 29, 1989) (*"Negotiated Rates II"*). This decision supplements the ICC's earlier decision of the same name reported at 3 ICC 2d. 99 (1986). The supplemental decision outlines the ICC's reasons for concern with carrier practices of the type alleged by Petitioner. *Negotiated Rates II* at 5 ICC 2d. 631-634. The decision further emphasizes that rate filing requirements under 49 U.S.C. § 10761 remain in effect, but that assessment of such rates may be found to be an unreasonable practice under appropriate circumstances. *Id.* at 627, 631. Such an exercise of the ICC's powers is entirely in accord with 49 U.S.C. § 10701 and with the long line of precedents cited in the Petition for Certiorari.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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